

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BAY AREA PROPERTIES, LLC,
D/B/A BAYCREST VILLAGE

Employer

and

Cases 36-RC-6499

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 206

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned makes the following findings and conclusions.¹

I. SUMMARY

Bay Area Properties, LLC, d/b/a Baycrest Village ("the Employer"), is a limited liability company that operates a skilled nursing care facility in North Bend, Oregon ("the facility") where it provides rehabilitative and long-term care to patients and residents.

International Brotherhood of Teamsters, Local 206 ("Petitioner"), filed the instant petition seeking to represent a unit of approximately 18 nurses employed at the facility. The Employer contends, contrary to Petitioner, that the petitioned-for unit is inappropriate as the nurses are supervisors as defined in Section 2(11) of the Act. Specifically, the Employer contends the nurses assign, responsibly direct, and discipline staff at the facility.²

¹ The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

² At hearing the Employer introduced evidence that would appear relevant to an assertion that the nurses at issue evaluate staff at the facility, an additional Section 2(11) factor. The Employer does not address that assertion on brief, and to the extent it was raised previously I consider the argument dropped, and I have not addressed it further in this Decision as the record does not support the assertion.

Based on a careful review of the record evidence and the parties' contentions, arguments, and briefs, I conclude, consistent with Petitioner, that the petitioned-for nurses are not statutory supervisors, as they lack the authority to assign, responsibly direct, or discipline employees using independent judgment.³

Below, I have provided a section summarizing the facts in this matter. Following the "Facts" section is my analysis of the applicable legal standards in this case and my conclusions. Finally, I set forth below details of the directed election, and the procedures for requesting review of this decision.

II. FACTS⁴

A. The Employer's Operations

The Employer's facility provides skilled nursing care to short-term patients and long-term residents.⁵ In providing this care, the Employer employs 10 licensed practical nurses and 8 registered nurses (collectively "charge nurses") at the facility. The Employer also employs 45 certified nursing assistants, five certified medical aides, and three restorative aides (collectively "CNAs").⁶

The facility is a three-story building, with each floor serving a different function. The ground floor is a short-term skilled nursing facility that provides care and rehabilitation to patients.⁷ The ground floor consists of a health center and two halls, known as the "front" and "back" halls. Each hall has a capacity for about 25 patients. On any given shift, one charge nurse will be assigned to each hall. Although, the number of CNAs fluctuates based on the time of day and the number of residents, which varies, between 3 and 5 CNAs will generally be on each hall.

The second floor of the facility is a long-term care facility, for residents who do not require medical care. No charge nurses or CNAs work on the second floor.⁸

³ The Employer and Petitioner submitted timely briefs, which were fully considered.

⁴ The Employer called Resident Care Manager Michelle Dieckman, Director of Nursing Services Wandah Fowler, and Charge Nurse/Temporary Resident Care Coordinator Dawn McIntire as witnesses. The Petitioner called Charge Nurses Michael Kelley and David Ross as witnesses.

⁵ The Employer operates a senior care campus in North Bend, Oregon, that includes a skilled nursing facility, as well as independent and assisted living apartments. The Employer also operates a memory care center in North Bend, approximately four miles from the campus. The nurses in the petitioned-for unit are employed exclusively at the skilled nursing facility.

⁶ Although explained fully in the record, it is not necessary for the purposes of this decision to delineate the differences in training and ability between registered nurses and licensed practical nurses. Both are treated as identical charge nurses for purposes relevant to this decision. Similarly, it is not necessary to delineate the differences among certified nursing assistants, certified medical aides, and restorative aides. All are CNAs and are treated identically by the Employer for purposes relevant to this decision.

⁷ Patients on the ground floor generally stay between 20 and 30 days before discharge, but they may stay up to 100 days. At that point, if not ready for discharge, the patient is transferred to the third floor or other long-term care facility. Individuals on the ground floor are patients; they do not live permanently at the facility, while those on the third floor are residents. However, for the remainder of this decision, as the distinction is not relevant, I will refer to both as "residents."

⁸ A single "community nurse," employed by the Employer, rotates between the independent living, assisted living and memory care units as needed. This employee, Cheryl Eaton, may visit the

The third floor is the intermediate care unit, a long-term care facility for full-time residents with medical needs. The intermediate care unit has a capacity of 32 residents and, due to the nature of long-term care and a waiting list, does not have fluctuations in the number of residents, unlike the ground floor. The residents on the third floor are divided into "sets;" five sets during the day, three in the evening, and two at night. One charge nurse is scheduled to work on the third floor at all times, and one CNA is scheduled for each set.

Charge nurses work 12-hour shifts (with shift changes at 6:30 a.m. and 6:30 p.m.), on a 3-day-on, 4-day-off rotation. A charge nurse will work on the same floor within a 3-day period, but the assigned floor will alternate between the ground floor and third floor at the beginning of each new 3-day shift. CNAs work 8-hour shifts (with shift changes at 6:30 a.m., 2:30 p.m. and 10:30 p.m.) on a 4-day-on, 2-day-off rotation. As with charge nurses, CNAs will work on the same floor within a 4-day period, but the assigned floor will alternate between the ground floor and third floor at the end of each 4-day period. The CNA schedule is developed monthly by the Staffing Coordinator, a Human Resources employee.

Charge nurses and CNAs report to Director of Nursing Services Wandah Fowler. Fowler in turn reports to the facility Administrator. Fowler is the most senior nurse at the facility, and in her role as Director of Nursing she is responsible for staffing, including hiring and firing of charge nurses and CNAs, as well as other managerial tasks. Other nurse managers are assigned to each of the areas where charge nurses and CNAs are employed. Michelle Dieckman is the Resident Care Manager for the ground floor back hall, Rose White is the Resident Care Coordinator for the ground floor front hall, and Rachel Hammel is the Resident Care Coordinator for the third floor.⁹ A fourth employee, charge nurse Dawn McIntire, is currently serving as a Resident Care Coordinator for the ground floor health center in a temporary capacity.¹⁰ Resident Care Managers and Coordinators oversee each resident's care plan, and perform tasks related to Medicare and Medicaid payments.

There is no evidence of prior bargaining history in the petitioned-for unit in the record. Since October of 2010, the CNAs at the facility have been represented by the United Food and Commercial Workers Union.

second floor residents. The record does not contain sufficient evidence on the community nurse position to make a finding regarding whether she should be included in or excluded from the unit found appropriate herein and the parties have taken no position on the issue.

⁹ Resident Care Manager and Resident Care Coordinator are equivalent and identical positions; the difference in title reflects merely whether the nurse is a registered or licensed practical nurse. The parties stipulate that both positions are managerial. In light of the stipulation, I shall exclude the Resident Care Manager and Resident Care Coordinator positions from the unit found appropriate herein.

¹⁰ The parties agree the Resident Care Coordinator is a managerial position, but that McIntire, who is in the position only temporarily, is not a managerial employee. The record does not contain sufficient evidence regarding the nature of McIntire's temporary capacity to make a determination regarding her eligibility to vote in the election that is directed below.

B. Resident Care

When admitted to the ground or third floor, a resident is assessed and the charge nurse on duty creates a care plan.¹¹ The care plan includes basic information, including how the resident is to be transferred, how the patient eats, dresses, and whether they use glasses or dentures. The care plan remains readily posted and visible in the resident's room, and is available for reference by the nurses and CNAs. Charge nurses and CNAs are in regular contact with residents, and they work collaboratively to update the care plan. Although regulations permit only a charge nurse to actually modify the care plan, the evidence reveals that when charge nurses make a change to the care plan it is largely based on a mixture of assessment, personal observation, and the reported observations of the CNAs.

The Oregon Nurse Practice Act regulates both charge nurses and CNAs. That act requires charge nurses to "supervise" or "monitor" the work of the CNAs with whom they are working, in that the charge nurse must "periodically observe and evaluate the skills and abilities of the [CNA] to perform authorized duties." The charge nurses do this in the course of their regular duties, which consist of passing medication, performing some medical testing and care, and assessing residents. CNAs provide physical care to patients and residents, assisting or performing tasks such as grooming, feeding, bathing, and moving.¹² In addition to their regular tasks, charge nurses and CNAs must also respond to requests from residents and unexpected occurrences.

Fowler testified she spends almost all of her work day out of her office, working on the floors with the charge nurses and CNAs. She estimated she spent approximately 75 percent of her time on the ground floor, and 25 percent is on the third floor observing the work of the charge nurses and CNAs. Fowler testified while she primarily observes and oversees the work of the charge nurses and CNAs as they provide care to residents, she will also assist residents as needed.

The record does not contain information regarding the job functions of the Resident Care Manager and Resident Care Coordinators, and their role in managing the facility.¹³ The record also does not contain written job descriptions for these positions, the Director of Nursing, or charge nurses.

¹¹ There is confusion in the record regarding the number and role of the Employer's care plans. The Employer appears to utilize several care plans. The first is developed when the resident is admitted. Several witnesses refer to a second care plan, but this is apparently a temporary addition to the plan if the resident has a change in status, such as infection or a fall, that requires a specific course of action. A third is referenced in the record as being maintained by the Resident Care Manager or Resident Care Coordinator, but this third plan is apparently not available on the floor. Lacking clear evidence to the contrary, here I have treated the care plan in the resident's room, with its changes and any temporary additions, as a single document, and I have referred to it simply as the "care plan." While this may be an overgeneralization from a clinical perspective, it appears sufficient and desirable in the interest of clarity for the purposes of this decision.

¹² The care plan may dictate the manner in which some tasks are performed, but many of the tasks the CNAs perform include routine grooming, bathing, and transport to dining times.

¹³ The Resident Care Managers and Coordinators do not appear completely removed from the work of the charge nurses and CNAs, as I note the signatures of Resident Care Managers and Coordinators appear on some of the disciplines in the record.

C. Charge Nurses' Duties and Responsibilities

1. Assignment

The CNAs' monthly schedule determines which CNAs will be on which floor on any given shift. The evidence indicates the employer has a practice of attempting to keep CNAs with residents with whom they are familiar. As previously noted, a CNA scheduled to work on the third floor will generally work on that floor for an entire 4-day rotation. Fowler testified that within that 4-day work week, the CNA would typically be assigned to work with the same residents, as there are efficiencies to be gained by CNAs working with residents with whom they are familiar. As Fowler testified, "normally, they try to keep them where they were the day before."¹⁴

Although the days, time and floor where CNAs work is assigned by the monthly schedule, charge nurses do make assignments to CNAs once they report for work.¹⁵ If it is the first day of the CNA's work week, or if circumstances have changed, the charge nurse will assign the CNA to residents.¹⁶ The evidence indicates that particular patients or residents may present particular challenges to the staff. For example, a resident may not be able to get out of bed without assistance, may require a "two person lift" (their size requires two employees to lift or move safely), may be reluctant to get out of bed, or the resident may be abusive or combative. These are factors that could be considered in the charge nurses' assignments. Specifically, a charge nurse may assign a stronger CNA to a resident who cannot get out of bed or requires a two person lift, may assign a more "motherly" (McIntire's phrase) CNA to a resident who requires coaxing, and may select a CNA less likely to take offense to a resident who may be abusive or difficult.¹⁷

Charge nurses may also take into consideration stated preferences by residents or their families, same sex CNAs for personal care for example. In addition to these considerations, charge nurses may also assign consistent with certain established practices. For example, new charge nurses and CNAs are trained by shadowing experienced employees in the respective positions. Accordingly, if a new CNA is scheduled, a charge nurse may pair that inexperienced CNA with an experienced CNA.¹⁸

¹⁴ The evidence suggests this assignment does not extend past a single work week. However, when the CNA next rotates to the floor they will not necessarily be matched with the same patients or residents they previously assisted.

¹⁵ In practice, on the ground floor these amount to assigning a CNA to the front hall or back hall, and on the third floor it involves assigning a CNA to a resident set.

¹⁶ The Employer did not quantify in the record the regularity and/or frequency of a change in circumstances requiring a change in the residents with whom a CNA is working.

¹⁷ There is some evidence in the record that charge nurses may also make assignments of general tasks, such as organizing a utility room, that are not directly related to resident care. The regularity and/or frequency with which this occurs is not established in the record.

¹⁸ Several witnesses stated that matching a CNA with a workload appropriate for their experience level has the side benefit of reducing turnover, which can be high among CNAs at the facility, because it reduces "burnout."

Additionally, charge nurses do have the ability to move CNAs from one floor to the other if unusual circumstances dictate a change from the schedule.¹⁹ At hearing, Fowler provided the example of a CNA calling in, and a charge nurse requiring a CNA to move from the ground floor to the third floor to maintain state mandated ratios. As with any of the assignments or directions made by charge nurses, CNAs can be reported to the Director of Nursing for failing or refusing to follow the instruction of a charge nurse.²⁰

Fowler testified that charge nurses are authorized to approve overtime, and may allow a CNA to work past the end of the CNAs shift if necessary to meet the legally mandated staffing ratios. In regard to assignment, it is not disputed that CNAs are required to perform the tasks assigned by charge nurses.

2. Responsibly Direct

As described above, charge nurses do have a role in monitoring or supervising CNAs. The Employer introduced several disciplines in the record purporting to show that this role extends to charge nurses receiving discipline for the failure of a CNA to perform a task.

First, discussed at length in the record, was the August 12, 2010, discipline of then Charge Nurse Michelle Dieckman, currently a Resident Care Manager. The narrative portion of that discipline reads:

Did not get alarms to put in [wheelchair] & bed after they were put on care plan by this employee. As a result this [patient] fractured hip. This is not acceptable behavior for a [licensed nurse].

Dieckman testified at hearing and explained that she had indeed added the alarm provision to the care plan, but had then delegated that task to a CNA. The CNA did not place the alarms as instructed, and after the resident fell Dieckman was disciplined. Neither Dieckman nor Fowler addressed who, if anyone, else was disciplined as a result of the incident, but McIntire testified that the CNA involved was also disciplined, as were other charge nurses who failed to follow the care plan. However, documentation of this additional discipline was not submitted into the record.

Second, the Employer placed in the record the October 30, 2009, discipline of charge nurse Cheryl Corral. The narrative portion of the discipline states:

You must fill in ICF employee assignment sheet each time you work. It is how we keep track of compliance and staff. It is not ok to leave it blank.

Testimony at hearing clarified that the reporting at issue was required documentation regarding which CNAs were assisting which residents.

Finally, the Employer submitted an August 22, 2009, discipline of charge nurse David Ross. At the top of the discipline form is a section titled "improvement needed in," with four boxes, checked: "attendance," "work performance," "attitude," and "other." This

¹⁹ The record does not contain evidence indicating the regularity and/or frequency of such movement.

²⁰ Whether this reporting constitutes discipline is a separate issue and is addressed in a following section.

discipline has the "other" box marked, and "supr" written in the blank provided next to the "other" option. The narrative portion of this form reads as follows:

Specific examples: Rm 310b was left [in an unsanitary condition] by CNAs -this is neglect - this made the entire breakfast late.

Future expectations: be sure to supervise CNAs to be sure residents are cared for the best way we can. It's not acceptable for this to happen to our residents. It's your job to be sure it doesn't. Thanks!

In addition to the disciplines addressed above, the Employer also introduced three evaluations of charge nurses and one of a CNA. The Employer asserts these demonstrate that Fowler, in evaluating charge nurses and CNAs, assesses the skill with which charge nurses supervise CNAs, and CNAs ability to be supervised. Three of the evaluations, for CNA Jerry Olds, Charge nurse Dawn McIntire and Charge nurse Linda Martin, are on a form that is a mix of boxes to be marked and narrative sections, with 7 boxes under the title "work product," 15 boxes under the title "work habits," 10 boxes under the title "skills and knowledge," 13 boxes under the title "attitudes," and two boxes under the title "mission/vision/values."²¹

Although none of the nearly 50 boxes above address supervisory issues, the evaluations in the record contain references to supervision in the narrative. CNA Old's evaluation, under attitudes, states "not always cooperative [with] supervisor when asked to do things." Charge Nurse Culver's evaluation, under "suggestions for improvement," states in part: "supervise more to see that job is being done by [CNAs]." McIntire's evaluation, under "employee strong points" reads in part "very good supervisor skills." Martin's evaluation, under "employee strong points" states in part "She is a good leader on the floor and supervises well."

3. Discipline

The Employer purports to have a progressive disciplinary policy, but the evidence in the record indicates this is either not the case, or the policy is applied so loosely as to not be relevant. As asserted, employees who receive three written disciplines for the same type of infraction are supposedly terminated. However, no written disciplinary policy was entered into the record, while the individual disciplines that were entered into the record do not support the policy referenced in the testimony of the Employer's witnesses. Specifically, CNA Adam Whirls received nine written disciplines between July of 2009 and his eventual termination in February of 2010, eight of which were for poor work performance, including three written disciplines for poor work performance in the 3-day span of August 1, 2, and 3, 2009.

It is, however, undisputed that charge nurses have the authority to issue these disciplines or reports.²² If a charge nurse observes or discovers a problem in the work performance or behavior of a CNA, the charge nurse will counsel the CNA. This

²¹ The fourth evaluation, of charge nurse Peggy Culver, is on a different form of substantially the same content, and which also uses marked boxes and narrative sections.

²² I use the descriptor "written warnings" in this decision to identify a negative written documentation of a CNA by a Charge nurse. The actual forms used by charge nurses are varied, ranging in titles from "Discipline Documentation Form," "Personnel Action Request Form," "Employee Counseling Form," "Employee Coaching Statement" and, by handwritten notation, "Employee Warning Statement."

counseling can vary in form from orally noting the problem, and how it should be corrected, to documenting the problem as a written warning and forwarding it to Fowler as the Director of Nursing. The Employer entered over 30 of the documented counselings as evidence charge nurses have the authority to discipline CNAs.

The record also indicates Fowler tells charge nurses they have the authority to counsel and issue written warnings on numerous occasions, including during hiring interviews of charge nurses and the charge nurses' monthly meetings. Charge nurses have discretion in determining when to elevate discussion to a written warning, they are not required to obtain approval prior to issuing such a warning, and there are no Employer-provided guidelines regarding when CNAs must be counseled.²³ Charge nurses have the authority and an obligation under state law to remove a CNA from resident contact where the issue with the CNA is one of abuse.²⁴ In that circumstance, however, the charge nurse does not have discretion regarding acting, state law requires the removal of the CNA from the residents.

In short, the record establishes that the Employer does not have a consistent progressive discipline policy, and that charge nurses have the authority to issue written discipline. However, the record is less clear on what impact the written discipline has on CNAs. Only Fowler has the authority to suspend or terminate CNAs, and the evidence demonstrates she conducts an independent investigation before doing either. Fowler repeatedly testified that she relies on the written discipline contained in a CNAs' personnel file in making these decisions, but she did not clarify the nature and extent of that reliance. Moreover, Fowler did not address why she allowed CNA Whirls to accumulate nine similar documented incidents of purported "discipline" before he was terminated. In regard to Whirls, she merely confirmed that she conducted an independent investigation, including a review of the written "discipline" in his personnel file, before deciding termination was appropriate.

The procedure regarding issuing a written counseling has recently changed. Previously, the charge nurse would document the facts on a written discipline, provide a copy to the CNA, and forward it to the Director of Nursing. All the written disciplines would then be placed in the CNAs personnel file, and if in reviewing the written warning Fowler determined further action was necessary, she would investigate further and potentially take additional action. Because the CNAs are now represented by a labor organization, written disciplines are presently given to Fowler, who then meets and presents the written discipline to the CNA after they are provided an opportunity for union representation.

4. Secondary Indicia

Charge nurses have a monthly meeting with Fowler, occasionally attended by a physician. Charge nurses also participate in training related to medical topics at the facility and at other locations. Fowler evaluates both charge nurses and CNAs on a yearly basis. The wages of the charge nurses and CNAs are significantly different. The starting wage of a charge nurse is between 24 and 28 dollars an hour, while the starting

²³ While the Employer has no independent guidelines regarding counseling a CNA, it is clear from the record that a violation of state regulation would trigger a counseling.

²⁴ According to Fowler's testimony, this is the only circumstance where a charge nurse must send a CNA home or otherwise require the CNA to leave the facility.

wage of a CNA is generally 10 or 11 dollars an hour. Further, CNAs are not eligible to participate in the same health insurance plan as charge nurses and management.

It appears from the record that the five nurse managers identified in the record all work during regular business hours. The record establishes three charge nurses and 10 to 15 CNAs are also scheduled for day shifts, creating an approximate ratio of one manager to every three or four employees during the day. No manager appears regularly scheduled on nights or weekends, and it is not clear whether Fowler or other managers are available by telephone at those times. Further, the managerial employees who testified stated they perceived the charge nurses to be supervisors and, as noted, CNAs are aware they are to follow the directions and/or assignments of charge nurses.

III. LEGAL ANALYSIS

Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), the Board, citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), iterated its three-part test, which finds individuals to be statutory supervisors if:

(1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11);

(2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and

(3) their authority is held "in the interest of the employer."²⁵

The Board has also established that the burden to prove supervisory authority, by a preponderance of the evidence, is on the party asserting it. *Croft Metals, Inc.*, 348 NLRB 717, 721. (2006). See also, *Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center*, 352 NLRB 864 (2008). "Purely conclusory" evidence is not sufficient to establish supervisory status; and a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). To qualify as a supervisor, it is not necessary that an individual possess all of the criteria specified in Section 2(11), instead, possession of any one of them is sufficient to confer supervisory status. *Lakeview Health Center*, 308 NLRB 75, 78 (1992). Finally, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find

²⁵ The Supreme Court in *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571 (1994) held that "[s]ince patient care is a nursing home's business, it follows that attending to the needs of patients, who are the employer's customers, is in the employer's interest." Accordingly, this decision will focus its analysis on the first 2 prongs (supervisory criteria and independent judgment) of the *Oakwood* test.

that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Thus, here the burden is on the Employer to demonstrate that the nurses are supervisors within the meaning of Section 2(11) of the Act.

Before turning to the Section 2(11) factors at issue in this case, I will address an initial matter. At several points on brief Petitioner addresses the credibility of the Employer's witnesses. Although a representation case hearing is a formal proceeding, it is investigatory and non-adversarial. See *Case Handling Manual II (Representation)*, Sec.11181 and 11185. Accordingly, I have not made credibility determinations in regard to the testimony adduced at hearing.

A. Assignment

"Assignment" is defined as the "giving [of] significant overall duties, *i.e.*, tasks, to an employee", as well as "designating an employee to a place (such as a location, department, or wing), [and] appointing an employee to a time (such as a shift or overtime period)." *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). However, every instruction in the workplace is not an assignment; "significant overall duties" do not include "*ad hoc* instructions to perform discrete tasks;" these instructions are considered "direction" of a non-supervisory nature. *Id.* Similarly, working assignments made to equalize work among employee's skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment. *Providence Hospital*, 320 NLRB 717, 727, 731 (1996), *overruled in part by Oakwood Healthcare*, 348 NLRB 686, 686, fn.29 (2006).

The Board has defined the statutory term independent judgment in relation to two concepts. As an initial matter, to be independent, the judgment exercised must not be effectively controlled by another authority. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently independent under the Act. *Id.* The mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. *Id.* The Board further found that the degree of discretion exercised must rise above the routine or clerical in order to constitute independent judgment under the Act. *Id.*

Here, the record establishes that while charge nurses make assignments to CNAs, these assignments are either *ad hoc* instructions, not the assignment of significant overall duties, or are routine and do not require the use of independent judgment. The charge nurse assignment most fully developed in the record is the assignment of a CNA to a group of residents.

As an initial matter, I note a charge nurse will not make this assignment frequently, as the practice of keeping a CNA with the same group of residents minimizes the need for assigning CNAs. To the extent the Employer asserts assignments are fluid and assignments are reevaluated and modified frequently, the regularity and frequency of these changes is unquantified in the record.²⁶ The evidence instead demonstrates while

²⁶ On brief, the Employer asserts charge nurses "regularly re-assign CNAs to other sets in the middle of the 4-day workweek when the need arises." While, the evidence does indicate that a

an important assignment, the assignment of CNAs to specific residents is relatively infrequent. When such an assignment is made, the evidence indicates charge nurses generally limit their consideration to the readily apparent physical and personality attributes of the CNAs.²⁷ For example, that a stronger CNA is wisely paired with a resident that requires a two person lift, or that a more experienced CNA is properly paired with a new employee, or that a resident who requests same sex grooming should be assigned a CNA of the same sex, represent self-evident choices, which do not require independent judgment.

The record evidence on balance indicates that other charge nurse assignments, regarding the specifics of CNA work, are routine. For instance, the CNAs' tasks with each patient are dictated by the care plan for each resident, and the care plan is a collaborative effort. Thus, I do not give significant weight to the charge nurse being the only one to make actual written changes when multiple witnesses described a collaborative process in which charge nurses and CNAs work together to maintain an accurate care plan. As such, I conclude that the Employer has failed to establish that charge nurses, when assigning CNAs to residents, are assigning CNAs using independent judgment.

In regard to designating CNAs to a time and place, the record reveals insufficient evidence on which to base a Section 2(11) finding. Specifically, the record establishes that Human Resources, not charge nurses, determine what shifts and which floors in the facility CNAs will work. Again, charge nurses may play a role on an *ad hoc* basis, reassigning a CNA to a different floor if the state mandated ratios require, but the record lacks sufficient evidence that the charge nurses use independent judgment in that role. The record does not contain concrete evidence of charge nurses having the ability to make these staffing adjustments beyond this required instance. Similarly, the record indicates that while a charge nurse may require CNAs to stay beyond the end of their shift, earning overtime, this is done only when necessary to meet state mandated staffing levels.

There is no evidence that assignment, broader than that described above, is contemplated by the Employer. There is no evidence that the charge nurses' monthly meeting, or the training nurses receive on-site or off-site, addresses greater assignment than that described above. Based on the above and the record as a whole, the Employer has not met its burden of establishing the nurses possess the authority to assign employees as defined in Section 2(11) of the Act.

B. Responsibly Direct

The Employer also asserts that licensed nurses responsibly direct caregivers. The Board defines the statutory term "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the

charge nurse will reassign a CNA if necessary, the Employer's assertion regarding regularity and frequency is not supported by concrete evidence in the record.

²⁷ With respect to nurses considering personality attributes, witness testimony reveals that, because of the rotation among floors, the charge nurses and CNAs are familiar with each other. Thus, considerations involving personality attributes would be readily discernible and involve insignificant judgment.

direction is both responsible...and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB 686, 692 (2006). Further, with responsible direction, the Board said, “We agree with the circuit courts that have considered the issue and find that for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one performing the oversight if the tasks performed by that employee are not performed properly.” *Id.* Thus, accountability is established where putative supervisors have the authority to take corrective action and are subject to adverse consequences for the performance of their staff. *Id.*

The requisite showing of accountability is not present where the putative supervisor is disciplined because of his or her own inadequate performance. Rather, the requisite showing is present only when the putative supervisor satisfactorily performed his or her own duties but nevertheless is disciplined because the staff failed to properly perform their tasks. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood Healthcare*, 348 NLRB at 695.

Here, the evidence in the record does not demonstrate that charge nurses are subject to discipline or other immediate consequences for the actions or inactions of the CNAs with whom they work. In regard to Dieckman’s alarm discipline, the discipline makes clear on its face that she was being disciplined for her own deficiency, and Dieckman stated as much in her testimony. The discipline speaks directly to Dieckman’s failure to perform a specific act. That she delegated the task to a CNA and the CNA also failed was apparently the basis for additional discipline of the CNA, but Dieckman’s discipline was clearly for her failure to place an alarm, not a failure to assure that the CNA placed an alarm. I additionally note in regard to this discipline that other charge nurses were disciplined for this incident, which was serious, as a resident fell and fractured a hip.

In regard to Corral’s discipline, I do not find it supports the Employer’s position. Clearly the discipline again speaks directly to a charge nurse’s failure to perform a specific act, completing paperwork. That the subject of the paperwork was CNAs does not establish responsible direction.

I do find, however, that the Ross discipline was issued to hold Ross accountable for the failure of a CNA to adequately care for a resident. While it mentions Ross’s need to better supervise, it also explicitly states that it is his job to make sure that CNAs adequately care for residents. This is precisely the type of evidence of responsible direction contemplated by the Board in *Oakwood Healthcare*. However, the deficiency in asserting this discipline as support of the Employer’s argument is the problem that faces all discipline issued by the Employer; it only has weight if and when the Director of Nursing determines it has weight. Although this issue is addressed more fully in the following section, because no established progressive discipline procedure exists, I do not find that Ross was “disciplined” for the failure of the CNA in this instance. Concededly, this document is in Ross’s personnel file, for consideration by Fowler should she determine at some later date to suspend or terminate Ross. However, at this point in time, this isolated incident is insufficient and too conditional to warrant finding all

charge nurses possess indicia of supervisory authority. Accordingly, I conclude that charge nurses do not responsibly direct CNAs in that the evidence does not indicate they are held responsible for the actions or inactions of the CNAs with whom they work.

In regard to evaluations in the record, I find little or no evidence demonstrating evidence of responsible direction. In regard to the Olds' evaluation, it addresses deficiencies in being supervised, but contains no information regarding by *whom*. It could be charge nurses, Fowler, or both. Further, the use of "supervision" is unhelpful without context because as stated previously, "supervision" could be defined by employers, state law/regulations, or in ways that do not fall within the definition of Section 2(11) of the Act. The same problem exists with the suggestion to Culver to "supervise more to see that job is being done by [CNAs], and with McIntire and Martin's positive comments on their "supervision." It is not disputed that charge nurses have a state statutory obligation to "supervise" or "monitor" CNAs, but without additional context these comments fail to demonstrate accountability. Further, such narrative comments added to an evaluation fail to establish in the record what impact, if any, these comments have on the evaluation, and what, if any, impact the evaluation has on the charge nurses' employment. Based on this absence of context and impact evidence, I find the evaluations do not support a finding that charge nurses are held responsible for the actions or inactions of the CNAs with whom they work.²⁸ I further conclude that the Employer has not met its burden of establishing that the nurses responsibly direct employees within the meaning of Section 2(11) of the Act.

C. Discipline

The Board recently reaffirmed that actual authority to discipline, rather than "paper authority" is necessary to establish supervisory status. *Loyalhanna Care Center*, 352 NLRB at 865, citing *Golden Crest*, 348 NLRB 727. The power to point out and correct deficiencies in the job performance of other employees is insufficient to establish that an employee is a supervisor under Section 2(11) of the Act. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations). In addition, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will affect employees' job status. *Id.*, at 830 (2002) (reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations); see also, *Ohio Masonic Home*, 295 NLRB 390, 393 (1989) (although documents were placed in an employee's personnel file, the record did not establish that the warnings automatically led to any further discipline or adverse action against an employee). Rather, to confer 2(11) status, the exercise of disciplinary authority must

²⁸ In regard to the lack of evidence on this point, I note an additional problem. The Employer, on brief, asserts "Charge Nurses are also evaluated on how well they use judgment in supervising and directing CNAs," and a citation to the record follows. Examination of the record, however, reveals scant support for this assertion. The brief cites broadly to the testimony of Fowler over several pages of the transcript, but at this point in her testimony Fowler was simply responding with yes or no answers to leading questions, which the Employer's legal representative would then restate. The brief seems to rely on these responses for support, rather than the narrative testimony of the witness. While the rules of evidence are relaxed in a representation case hearing, I do not find this exchange provides adequate probative value for the Employer's argument.

lead to personnel action, without the independent investigation or review of other management personnel. *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (such authority is not supervisory unless it results in "personnel action ... taken without independent investigation or review by others"); see also, *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001); *Family Healthcare*, 354 NLRB No. 29, slip op. at 7 (June 4, 2009).

In cases involving a system of progressive discipline, however, even warnings which do not lead to direct and immediate adverse consequences can still be disciplinary in nature if they pave the way for future disciplinary action. In *Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center*, 351 NLRB 27, 29 (2007), the Board found that counseling forms completed by nurses constitute a form of discipline, even if such forms do not lead to immediate consequences, because such forms can lay out the foundation for future discipline. Similarly, in *Promedica Health Systems*, 343 NLRB 1351 (2004), enf'd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), the Board found a direct link between recorded verbal coachings and future disciplinary action. See also, *Progressive Transportation Systems, Inc.*, 340 NLRB 1044, 1046 (2003) (written discipline notices issued by purported supervisor relied on and specifically referenced by management when administering subsequent discipline). See also, *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1064 (2006).

The evidence demonstrates that charge nurses have authority to issue written warnings to CNAs, as was acknowledged by all the witnesses who testified at the hearing, including those called by the Union. However, the Employer has failed to demonstrate the impact such written warnings have on the CNAs. Specifically, the Employer has failed to establish a progressive discipline system, and has also failed to demonstrate immediate consequences outside such a system. Rather, the evidence shows the written warnings merely constitute reports of incidents to the Director of Nursing, who determines when and if the written warnings have any impact.

The record contains a number of examples of written warnings authored by charge nurses. The record also indicates that the written warnings were passed to Fowler as Director of Nursing, and copies placed in the CNAs' personnel files. However, there is no evidence that the written warnings automatically lead to more severe or immediate consequences. Rather, the evidence suggests that only in the most serious cases, after reviewing the written warnings, does the Fowler conduct a follow-up investigation. Accordingly, there is insufficient evidence to establish that infractions reported by charge nurses lead to meaningful consequences. While Fowler no doubt reviews the written warnings contained in a CNAs' personnel file in making her decisions, this does not elevate the warnings above the level of reports when Fowler did not apply any objective criteria, but merely considered the file documents in her ultimate discretion following her independent investigation. As such, I conclude that the charge nurses' ability to document CNAs' infractions does not constitute supervisory authority to discipline. See, e.g., *Phelps Community Medical Center*, 295 NLRB at 490-91.

I further find the lack of a progressive discipline system distinguishes the instant case from *Bon Harbor*, 348 NLRB 1062, cited by the Employer, and others, including *Oak Park Nursing Care Center*, 351 NLRB 27, and *Promedica Health Systems*, 343 NLRB 1351. Additionally, *Bon Harbor* also represents a different and distinguishable set of facts. There, the LPNs' disciplinary recommendations, even if incorrect, would not be changed by the director of nursing or the unit manager. In contrast here, Fowler takes

no action without independent investigation and no evidence was produced of any written warning leading to any consequence if in conflict with Fowler's determination.

I also conclude that the licensed nurses' ability to send employees home for obvious misconduct (e.g., abuse of residents, intoxication) is insufficient to establish their supervisory authority. The Board has found that the authority to send employees for flagrant misconduct does not constitute statutory supervisory authority. *Phelps*, 295 NLRB at 491-92. In total, I conclude the Employer has failed to meet its burden of determining that the charge nurses involvement in discipline of CNAs requires a finding that charge nurses are supervisors under Section 2(11) of the Act.

D. Secondary Indicia

I note initially that, having no primary indicia, reliance on secondary indicia alone would not be sufficient to find supervisory status.²⁹ However, it is necessary to note several factors in this regard.

Although not specifically raised by the Employer, it appears from the record and in light of my finding, at those times outside regular business hours (when Fowler and all the nurse managers are on site) charge nurses and CNAs are unsupervised. However, the full scope of Fowler and the other nurse managers' duties, responsibilities and coverage has not been developed on the record. For instance, it is not clear if a manager is available by telephone, or if employees contact managers when they are unable to resolve an issue at the facility. The Employer has not provided evidence to reach the conclusion that employees are "unsupervised" outside regular business hours, and as it is the Employer's burden to do so, I do not consider this factor in making my determination.

I also note on brief the Employer repeatedly argues that the Oregon Nurse Practice Act and the regulatory scheme derived from it for regulating nurses and CNAs requires nurses to act as "supervisors." While a state statutory directive may have some probative value, it is not dispositive, and the term as used in the Oregon regulations is defined differently than as used in Section 2(11). The Board has made clear, in *Oakwood* and prior to that, that the analysis of supervisory status is a fact-based inquiry into the nature of an employee's work, not a question of what they are directed to do on paper. Accordingly, I have addressed the regulatory scheme only where it is relevant to the Section 2(11) indicia addressed: the charge nurses' authority to assign, responsibly direct, and discipline.

Finally, the Employer's witnesses, and particularly Fowler, were repeatedly asked, and they repeatedly testified, that charge nurses are considered supervisors by the Employer. However, I find their subjective testimony regarding such authority to be unpersuasive as the record before me does not support finding the charge nurses possess indicia of supervisory authority as defined in Section 2(11) of the Act.³⁰

²⁹ Absent primary indicia of supervisory status, secondary indicia are not dispositive. *Training School at Vineland*, 332 NLRB 1412, 1412-1413 fn. 3 (2000).

³⁰ On brief, the Employer makes repeated reference to, and attempts to distinguish, my recent decision in *HSP Investments I, Inc.*, 19-RC-015349 (November 17, 2010). I will not address that decision and the Employer's argument, other than to note I disagree with the Employer's characterization of certain facts in both cases. I do note that *HSP Investments* also involved

IV. CONCLUSION

Based on the foregoing and the record as a whole, I find that the Employer has not met its burden of establishing that licensed nurses possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. In particular, I find that the licensed nurses lack the authority to assign, responsibly direct, or discipline.

Accordingly, I shall direct an election in the following appropriate unit ("the Unit"):

All full-time and regular part-time registered and licensed practical nurses employed by the Employer at its North Bend, Oregon, skilled nursing facility; excluding all other employees, all other employees at other locations, Resident Care Managers, Resident Care Coordinators, managerial employees, guards and supervisors as defined by the Act.

There are approximately 18 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by International Brotherhood of Teamsters, Local 206.

A. List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for SubRegion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon*

supervisory status and nurses, and in both cases I have considered the respective records and the Board's standard for determining supervisory status as established by *Oakwood Healthcare*.

Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The SubRegional office will, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the SubRegional Office, 601 SW Second Ave., Suite 1910, Portland, OR 97204-3170, on or before **December 10, 2010**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of four copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

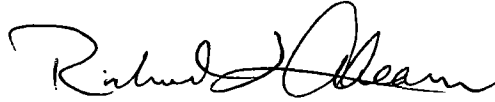
According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **December 17, 2010**. The

request may be filed through E-Gov on the Board's web site, www.nlr.gov, but may not be filed by facsimile.³¹

DATED at Seattle, Washington, this 3rd day of December, 2010.



Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

³¹ To file a request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BAY AREA PROPERTIES, LLC D/B/A
BAY CREST VILLAGE

Employer

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 206

Petitioner

Case 36-RC-6499

DATE OF MAILING: December 3, 2010


AFFIDAVIT OF SERVICE OF DECISION AND DIRECTION OF ELECTION.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document by first-class mail, e-mail and fax upon the following persons, addressed to them at the following addresses:

R.J. Burns, CEO
Bay Area Properties, LLC d/b/a
Baycrest Village
(Employer)

Victor J. Kisch, Attorney
Ryan Gibson, Attorney
STOEL RIVES LLP
900 SW Fifth Ave, Suite 2600
Portland, OR 97204
(Employer Legal Representative)

Gary Marconi, Union Representative
Teamsters Local 206
3427 Ash Street
North Bend, OR 97459
(Petitioner)


Cynthia Lundgren, Secretary

Subscribed and sworn to before me

on December 3, 2010.

DESIGNATED AGENT:


NATIONAL LABOR RELATIONS BOARD